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In The Supreme Court of the United States

October Term, 1995

BYRON KEITH COOPER,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Writ Of Certiorari To
The Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers [hereinafter NACDL] respectfully moves for leave to file its attached brief as *amicus curiae*, in support of petitioner Byron Keith Cooper. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but has not been received.

Amicus curiae is an organization dedicated to promoting the fair administration of criminal justice and ensuring due process for persons accused of crime. The NACDL and its state and local affiliates speak for over 8,000 regular members and over 28,000 affiliate members. This case poses a question that is of great concern to *amicus curiae*: can a capital defendant be forced to prove his incompetency to stand trial by a heightened standard? The long-standing interests and expertise of *amicus curiae* will, we believe, aid this Court in its deliberations in this case. Some of

the underlying issues in this matter include whether applying a heightened standard of proof will result in the trial of mentally incompetent defendants and, if so, what sort of impact that will have on the trial process. As an organization of defense attorneys, *amicus curiae* brings to the Court information about the role of defense counsel and the ability of counsel to provide effective representation to mentally disabled defendants. For these reasons, *amicus curiae* respectfully asks the Court to grant this motion and to permit the filing of the accompanying brief.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

QUESTION PRESENTED FOR REVIEW

May the state increase the risk of trying and sentencing to death a factually incompetent defendant by requiring a defendant to prove his or her own incompetency by clear and convincing evidence?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers [hereinafter NACDL] is a non-profit corporation with a membership of over 8,000 attorneys and over 28,000 affiliate attorneys in fifty states. The American Bar Association recognizes the NACDL as an affiliate organization, and awards it full representation in its House of Delegates. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal law, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's objectives are to promote the proper and fair administration of criminal justice, and to ensure due process for persons accused of crime.

The NACDL is greatly concerned by the State of Oklahoma's position, which seeks to undermine the constitutional right not to be tried and sentenced while incompetent. In the experience of the members of the NACDL, it is not possible to provide reasonably effective representation to defendants who are mentally incapable of understanding the charges against them and of assisting in their defense. The State's position, if accepted by this Court, would greatly increase the likelihood that factually innocent people will be convicted because they cannot provide the information that would lead to their acquittal at trial. The State's position would also undermine the reliability of capital sentences because defendants who are unable to assist their attorneys are — by definition — unable to bring relevant mitigating circumstances to the attention of their counsel and the courts.

STATEMENT OF THE CASE RELEVANT TO BRIEF OF *AMICUS CURIAE*

A primary focus of this brief is the inability of criminal defense attorneys to represent incompetent defendants. This Statement of the Case is not intended to supplant the Statement in the Petitioner's Brief. This Statement is included because portions

of the trial record illustrate the difficulties that defense counsel experience in representing mentally disabled defendants.

Petitioner Bryan Keith Cooper was charged with capital murder. Mr. Cooper's lawyers were given the task of defending him against this most serious charge, but Mr. Cooper was afraid of his attorneys and could not communicate with them or with defense investigators about the case. During the April 29, 1992 pre-trial motion hearing, lead defense counsel, Mr. Mildfelt, explained that Mr. Cooper had lunged or swung at co-counsel, Mr. Ravitz, and had accused counsel of trying to kill him with a rope. J.A. __; Tr. 4/29/92 at 207, 210. At a later hearing, Mr. Cooper himself testified of his fear of his attorneys, explaining repeatedly that they had tried to choke and kill him. J.A. ___; Tr. 5/4-5/92 at 42, 43, 57, 71. A medical expert, Dr. Philip Murphy, testified that Mr. Cooper's fear of his attorneys was genuine and honest, and that it was not part of any malingering whatsoever. J.A. __; Tr. 5/4-5/92 at 195. Mr. Cooper's fear became manifest at various times in court. Mr. Cooper sat over in the corner of the courtroom prior to the trial. J.A. __; Tr. 5/4-5/92 at 8. During the trial, he sat a distance from counsel and appeared withdrawn, even to prospective jurors. J.A. __; Tr. 5/5/92 at 9; Tr. 5/6/92 at 145, 147. Mr. Cooper curled into a fetal position on several occasions. J.A. __; Tr. 5/11/92 at 75; Tr. 5/4-5/92 at 35.

Defense investigators thought that Mr. Cooper was incompetent. J.A. __; Tr. 4/29/92 at 212. Mr. Cooper's attorneys and investigators were unable to get any useful information from him. As investigator Randall Bush testified,

> "It's been my job to go up and talk to [Petitioner], try to find out as much about the case as possible so I can help him. I go up to talk to Byron on numerous occasions and I get nothing. His pants are on fire, our office is trying to kill him, nothing to help me with his case, nothing that I can use. Nothing."

Tr. 5/4-5/92 at 140. Mr. Bush further testified, "[e]very time I talk to Cooper he's been just like in outer space. I get nothing from him. I get absolutely nothing from Cooper to help me." Tr. 5/4-5/92 at 142. During the second week of trial, counsel explained that Mr. Cooper had not spoken to him since the trial began. J.A. __; Tr. 5/14/92 at 142.

The medical expert, Dr. Murphy, also testified that Mr. Cooper was unable to assist or communicate with his counsel. J.A. __; Tr. 5/4-5/92 at 194, 195. Dr. Murphy did believe, however, that Mr. Cooper could attain competency within a reasonable period of time if he was provided with appropriate treatment. J.A. __; Tr. 5/4-5/92 at 240. Though this evidence showed that Mr. Cooper could become competent if treated, the judge nevertheless proceeded to trial. Mr. Cooper was convicted and sentenced to death.

SUMMARY OF ARGUMENT

Requiring a capital defendant to prove incompetency to stand trial by a evidentiary standard as high as clear and convincing is a violation of the Fourteenth Amendment's Due Process Clause, as well as the Eighth Amendment's prohibition against cruel and unusual punishments, which is applied to the States through the Fourteenth Amendment.

The high evidentiary standard results in a fundamentally unfair trial, in violation of the Due Process Clause. In *Medina v. California*, 505 U.S. 437 (1992), the Court focused on historical tradition and contemporary norms to determine whether a procedure was fundamental to a fair trial. Nevertheless, *Medina* and other decisions indicate some disagreement among the members of the Court as to the extent that the interests of the parties should be included in the due process analysis. *Amicus curiae* submits that in assessing whether a State's procedure results in an unacceptable risk of a fundamentally unfair trial, the Court

should balance the interests of the parties and consider historical tradition and contemporary norms.

Applying this test, the Due Process Clause prohibits the State from requiring a defendant to prove incompetency by a standard higher than preponderance of the evidence. Any higher standard leads to a substantially greater likelihood of factually incompetent defendants being forced to trial. A lawyer representing an incompetent defendant will be unable to provide the effective assistance of counsel required by the Sixth Amendment because so many aspects of the defense are based upon the client's ability to cooperate and provide information. Given the inexactitude of psychiatric diagnoses, such a high standard means that many factually incompetent defendants will be unable to prove their own incompetency. The interests of the State in prosecuting swiftly are outweighed by the compelling interests of defendants not to be tried while incompetent, and by the fact that defendants found incompetent are committed to mental health facilities, and hence pose no danger to the community.

Further, there is a strong common law tradition supporting preponderance of the evidence as the appropriate standard of proof to determine whether an accused is competent to stand trial. At common law, an incompetent defendant could not be tried. The standard of proof of competency has traditionally been preponderance of the evidence because the procedures to determine competency in criminal cases were modeled on the civil competency processes. Also, contemporary norms, as evidenced by the practice of the overwhelming number of jurisdictions, favor a preponderance of the evidence standard.

Wholly apart from this due process concern, the Eighth and Fourteenth Amendments forbid the State from requiring a capital defendant to prove his or her mental incompetency by clear and convincing evidence. The State may not erect a procedural barrier to the sentencing jury's consideration of relevant mitigating

evidence. A defendant cannot appear before the jury and give meaningful testimony, or otherwise present evidence in mitigation, unless he or she is competent and is capable of working with defense counsel. Oklahoma's heightened standard of proof is constitutionally impermissible because it leads to the wholesale exclusion of the defendant from the sentencing process, and thus prevents the sentencing jury from considering relevant mitigating evidence.

ARGUMENT

I. The Due Process Clause Prohibits A State From Requiring An Accused To Prove His or Her Mental Incompetency By The Heightened Standard Of Clear and Convincing Evidence.

A. To determine whether a State's procedure is fundamentally unfair, the Court should balance the relative interests of the parties, and consider historical practice and contemporary norms.

A State's calibration of proof violates the Due Process Clause of the Fourteenth Amendment if it offends some fundamental and deeply-rooted principle of justice. *Medina v. California*, 505 U.S. 437, 446 (1992); *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). In determining whether a fundamental and deeply-rooted principle of justice is offended, the Court often looks to historical tradition and contemporary norms. Members of the Court have not always agreed, however, on the extent to which the parties' interests ought to be weighed. *Amicus curiae* submits that the Court should expressly consider the relative harms to the State and to the accused in determining whether a high standard of proof denies a person a fundamentally fair trial. The due process calculus ought to include more than a search through history. It is not possible to determine what is a fundamental principle of justice unless one also considers the interests that that principle protects.

Prior to its decision in *Medina*, the Court appeared to balance the interests of the parties involved, often making reference to the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test.[1] For example, in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Court ruled that the Due Process Clause requires the State to provide a psychiatrist to an indigent accused if the issue of sanity is likely to be a significant factor in the defense. In assessing the requirements of due process, the seven-justice majority in *Ake* determined that the accused's interest in the accuracy of the criminal trial is "almost uniquely compelling," *id.* at 78, and outweighs any financial burden to the State. *Id.* at 78-79. The Court considered that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," *id.* at 80, and that, without it, "the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82; *see also United States v. Raddatz*, 447 U.S. 667, 677 (1980) (citing to the *Mathews* balancing test in ruling upon a due process challenge to the use of magistrate judges to decide suppression motions); *cf. Dowling v. United States*, 493 U.S. 342, 353-54 (1990) (weighing the various interests at stake to decide whether admission of prior acts evidence made a trial fundamentally unfair).

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[1]In *Mathews*, the Court described a three-factor test for evaluating procedural due process claims. The factors to weigh are:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews, 424 U.S. at 335.

In *Medina*, however, the Court moderated its mode of analysis. Ruling that the accused can be required to bear the burden of proving mental incompetency, a five-justice majority announced that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." *Medina*, 505 U.S. at 443. The majority opinion in *Medina* focuses, to a large extent, on historical tradition. Nevertheless, in its opinion, the Court does appear to balance the interests at stake. *See id.* at 448 ("we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation" (citation omitted)); *id.* at 449 (discussing the relationship between a claim of incompetency and a defense of not guilty by reason of insanity). Indeed, in her concurrence in *Medina*, Justice O'Connor notes, "I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*." *Id.* at 454 (O'Connor, J., concurring). Justice O'Connor found the *Mathews* test "a useful guide". *Id.* at 453. Her opinion identifies a number of relevant considerations in determining whether the placement of the burden of proof on the defendant is fundamentally unfair, including whether the placement of the burden of proof on the State is necessary to enforce a further right protected by the Constitution, such as the right to be tried while competent. *Id.* at 455.

Though the majority in *Medina* places great weight on historical tradition, subsequent decisions rely more extensively on other considerations. The issue in *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517 (1992) was whether the defendant could be required to bear the burden of challenging prior convictions under a recidivist statute. Writing for the Court, Justice O'Connor cites *Medina* and discusses historical tradition and contemporary practice. *Raley*, 113 S.Ct. at 524-25. But the Court's opinion also fully considers the interests at stake. It notes the State's interests in punishing habitual criminals. *Id.* at 522. It addresses the requirement that a guilty plea be knowing and voluntary, as

held in *Boykin v. Alabama*, 395 U.S. 238 (1969). *Raley*, 113 S.Ct. at 523. Finally, the opinion weighs the relative ability of each side to reconstruct records of prior convictions. *Id.* at 524-25.

Later the same Term, the Court decided *Godinez v. Moran*, __ U.S. __, 113 S. Ct. 2680 (1993). In ruling that the decisions to plead guilty and to waive counsel do not require a higher level of competency than that necessary to stand trial, the Court again considers the interests of the parties. The Court discusses the competency required to waive certain rights in the context of the nature of those underlying rights. *Godinez*, 113 S. Ct. at 2686-87. All criminal defendants must make important decisions once proceedings have been initiated. *Id.* at 2686. Decisions to plead guilty are not more complicated than other decisions that the accused must make. *Id.* And, "[t]his being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty." *Id.* In addition, "a trial court must satisfy itself that the waiver of [the defendant's] constitutional rights is knowing and voluntary," *Id.* at 2687. The Court's extensive discussion of the interests of the parties prompted a concurrence that restates the holding in *Medina*, and focuses on historical tradition. *Id.* at 2688, 2689-91 (Kennedy, J., concurring).

In deciding whether a heightened standard violated Mr. Cooper's right to due process, the court below placed undue reliance upon historical tradition. *See Cooper v. State*, 889 P.2d 293, 301-02 (Okla. Crim. App. 1995). This Court's analysis has not been so narrowly cabined. In determining the process due in criminal cases, the Court should consider the interests of both the State and the accused at least where, as here, the interests of the accused are those independently protected by the Constitution. After all, "[t]he concept of due process is, 'perhaps, the least frozen concept of our law — the least confined to history and the most absorptive of powerful social standards of a progressive society.'" *Medina*, 505 U.S. at 454 (O'Connor, J., concurring),

quoting Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in judgment). Where a State's procedure substantially affects a defendant's ability to exercise rights that are independently protected by the Constitution, the impact of the procedure on those rights ought to be part of the due process calculus.

B. The balance of equities strongly favors a preponderance of the evidence standard.

1. An accused has compelling interests in being tried while competent and in receiving the effective assistance of counsel.

The petitioner here, and defendants in similar situations, have two separate but related constitutional interests that are threatened by a standard of proof as high as clear and convincing evidence.

The first interest is the constitutional right to be tried while competent. An accused's competency is essential to a fair criminal proceeding. In *Drope v. Missouri*, 420 U.S. 162 (1975), the Court acknowledged the long-accepted rule that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial" and held that this prohibition "is fundamental to an adversary system of justice." *Drope*, 420 U.S. at 171-72; *see also* American Bar Association Criminal Justice Mental Health Standards, Std. 7-4.1(b) (1989) [hereinafter ABA Mental Health Standards] (describing the standard to determine competency). As Justice Kennedy has explained, "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel . . . ." *Riggins v. Nevada*, 504 U.S. 127,

139-40 (1992) (Kennedy, J., concurring in the judgment).

A second interest at stake, as identified by Justice Kennedy, is the Sixth Amendment right to effective assistance of counsel. A defendant who is tried while incompetent will likely also be denied his or her Sixth Amendment right because he or she will not be able to communicate sufficiently with an attorney to enable that attorney to provide effective representation. As the Court has stated, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings." *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). Counsel's actions critically depend on "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691. The NACDL, as *amicus curiae*, is particularly concerned about the impact of Oklahoma's rule on the ability of counsel to deliver the effective assistance guaranteed by the Sixth Amendment.

A defendant needs to be able to appreciate the role of counsel and assist the attorney throughout the entire process. This requirement begins soon after the defendant is arrested, perhaps even during a custodial interrogation, and it is especially important when the lawyer begins to build a defense. "Many important rights of the accused can be protected and preserved only by prompt legal action." American Bar Association, Standards for Criminal Justice, Std. 4-3.6 (3d ed. 1993) [hereinafter ABA Standards] ("Prompt Action to Protect the Accused");[2] *see also* National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases, Std. 11.4.1(d)(2) (1988) [hereinafter NLADA Standards] ("An in-

[2] "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable" in assessing the performance of counsel. *Strickland*, 466 U.S. at 688.

depth interview of the client should be conducted within 24 hours of counsel's entry into the case"); American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(D)(2) (1989) [hereinafter ABA Guidelines] (same).

When counsel begins preparing the accused's defense, the defendant is usually the primary source of information. ABA Std. 4-3.2 cmt. at 152 ("Interviewing the Client"). The lawyer may need to take steps early in the case to gather and preserve evidence and to protect the client's rights. ABA Std. 4-3.6 cmt. at 171. If a client is incompetent, it may be impossible for counsel to get information from him or her. Social science studies confirm that incompetent defendants are more passive with their attorneys than are competent defendants, and they are much less helpful in developing the facts of the case.[3]

Counsel has a duty to consider filing all potentially available pre-trial motions, including motions to obtain discovery

[3] One study compared attorneys' perceptions of clients in two groups — those clients whose competence was presumed by counsel, and those clients whose competence was doubted by their attorneys, even if the clients were not the subject of competency hearings. Hoge, Bonnie, Poythress & Monahan, *Attorney-Client Decisionmaking in Criminal Cases: Client Competence and Participation as Perceived by their Attorneys*, 10 Behav. Sci. & the L. 385, 387 (1992). Of the "presumed competent" group, 82% were "unusually active" or "somewhat active" in participating in their case. *Id.* Of the "competence doubted" group, only 44% were "unusually active" or "somewhat active" in their case. *Id.* The majority of the "competence doubted" group (55.6%) were deemed "pretty passive" by their attorneys. *Id.* Similar disparities were found in the clients' abilities to assist in developing facts for the defense. *Id.* A follow-up study confirmed these general findings. *See* Poythress, Bonnie, Hoge, Monahan & Oberlander, *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 Law & Hum. Behav. 437, 442-43 (1994).

and to suppress evidence and statements. *See* NLADA Std. 11.5.1(b) (counsel has a duty to consider all potential pre-trial motions, including discovery and suppression motions); ABA Guideline 11.5.1(B) (same). Counsel's ability to seek exculpatory evidence during discovery will be greatly restricted if the client is too disabled to tell counsel about facts that might lead to that evidence.[4] Similarly, it is extremely difficult to bring motions to suppress evidence and statements without the assistance of the client.[5]

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[4] Whether defense counsel is successful in obtaining exculpatory evidence from the prosecution depends upon the attorney's ability to specify the evidence that is important to the defense. *See United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (prosecution's duty to disclose certain exculpatory evidence may depend on whether there has been a specific request for it); Fed. R. Crim. P. 16(a)(1)(C) (upon demand, prosecution must turn over evidence that is material to the defense; unless a specific demand is made, however, the prosecutor may not know that evidence in his or her possession is material); *Allen v. District Court*, 803 P.2d 1164, 1168 (Okla. Crim. App. 1990) (prosecution shall disclose evidence that tends to negate the accused's guilt or reduce the punishment).

[5] A defendant must be competent to enable counsel to investigate and file a motion to suppress evidence or a statement that is unconstitutionally obtained. The accused will be a primary source of information on whether the police complied with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). Further, the Court has identified numerous factors to be considered in evaluating whether a confession is involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1972) ("length of detention, prolonged nature of the questioning, and the use of physical punishment such as deprivation of food or sleep" (internal citations omitted)); *Culombe v. Connecticut*, 367 U.S. 568, 622-23 (1960) (Opinion of Frankfurter, J.) ("physical brutality, threats of physical brutality, . . . deprivation of sleep, . . . disregard of his rudimentary need for food, . . . gruelling, intensely unrelaxing questioning over protracted periods . . . " (footnotes omitted)); *Miranda*,

(continued...)

Many defenses, such as self-defense,[6] entrapment,[7] duress and necessity,[8] and good faith,[9] have subjective elements and are

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[5](...continued)
384 U.S. at 476 ("lengthy interrogation or incommunicado incarceration" and whether the accused was "threatened, tricked, or cajoled").

[6] For example, the Model Penal Code provides that, under certain circumstances, "the use of force upon or toward another person is justifiable when *the actor believes* that such force is immediately necessary . . . ." American Law Institute, Model Penal Code § 3.04 (1985) ("Use of Force in Self-Protection") (emphasis added); *see also* Model Penal Code § 3.02 ("Justification Generally: Choice of Evils") ("Conduct that *the actor believes* to be necessary to avoid a harm or evil to himself or to another is justifiable . . . ." (emphasis added)); *Martin v. Ohio*, 480 U.S. 228, 230 (1987) (trial judge had instructed the jury that, with respect to the burden of proof of self-defense, the defendant had to prove, *inter alia*, that the defendant had *an honest belief* that she was in imminent danger); E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 23.12 (4th ed. 1990) ("Lawful Self-Defense") (an element of a defense to crime of assault on a federal officer is whether the defendant "honestly believed" that he or she was being attacked).

[7] Jurisdictions are split, but many, including the federal system, retain a subjective component to the defense of entrapment. *See, e.g., Jacobson v. United States*, 503 U.S. 540, 548-50 (1992) (lack of predisposition is an element of entrapment defense); *United States v. Russell*, 411 U.S. 423, 433-36 (1973) (lack of predisposition is a factual element); Devitt & Blackmar, § 19.04 ("Entrapment — Explained") (no entrapment when the person has "a previous intent or disposition or willingness" to commit the crime).

[8] In *United States v. Bailey*, 444 U.S. 394 (1980), the Court stated that an element of the common law defenses of duress and necessity is that given the imminence of the threat, committing the offense "was [the defendant's] only *reasonable* alternative." *Bailey*, 444 U.S. at 411-12 (emphasis added). Pattern instructions provide that an element of the

(continued...)

virtually impossible to establish unless the accused is fully able to assist the lawyer, and testify at trial. Even affirmative defenses that can be proved through the testimony of other witnesses, such as an alibi defense, may require early actions on the part of the defense team.[10] An incompetent defendant may well be unable to provide counsel with the names of alibi witnesses in a timely fashion, much less be able to support the defense by testifying at trial.

Oftentimes in criminal cases, the issue is not whether the accused performed the act in question, but whether he or she had the requisite intent and capacity. ABA Std. 4-4.1 cmt. at 182 ("Duty to Investigate"); *see also* ABA Mental Health Std. 7-6.1 ("Defense of Mental Nonresponsibility"); NLADA Std.

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[8](...continued)
defense of duress, coercion or compulsion is that the defendant had a "well-grounded" or "well-founded" fear that a threat of death or serious bodily injury would be carried out. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 6.04.02 (West 1995) ("Duress, Coercion or Compulsion"); *see also United States v. Kinslow*, 860 F.2d 963, 965-66 (9th Cir. 1988) (defendant must prove that "his fear was well grounded"), *cert. denied*, 493 U.S. 829 (1989).

[9] The defendant's good faith is a defense to many charges, such as fraud. "Good faith" is entirely subjective. As Devitt & Blackmar write, it means, "among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another." Devitt & Blackmar, § 19.06 ("The Good Faith Defense — Explained).

[10] *See, e.g.*, Fed. R. Crim. P. 12.1 (upon written demand by the prosecutor, defendant must state his or her specific whereabouts at the time of the crime and provide names and addresses of any alibi witnesses); Fed. R. Crim. P. 12.3 (defendant shall give pretrial notice if he or she intends to rely on a defense of public authority); Okla. Stat. Ann. tit. 22, § 585 (West 1992) (defendant must give notice of alibi defense prior to trial).

11.4.1(d)(2)(B) (counsel must explore information about the client's mental state and the presence or absence of any aggravating or mitigating factors); ABA Guideline 11.4.1(D)(2)(B) (same). The defendant may not be aware of the significance of facts relevant to criminal responsibility. A person who does not communicate these facts to his or her lawyer runs the risk of conviction even if that person acted under some diminished capacity.

Moreover, there are certain decisions that belong to the defendant, and an incompetent defendant will not be able to make them. *See* ABA Std. 4-5.2 ("Control and Direction of a Case"); ABA Std. 4-8.2 ("Appeal"). The decision to waive a jury trial must be made by the defendant alone. *See Patton v. United States*, 281 U.S. 276, 298 (1930) (trial by jury is a privilege that each defendant may forego at his or her election); ABA Std. 4-5.2 (a)(iii) (defendant's decision whether to waive a jury trial). Similarly, the decision to testify must be made by the defendant. *See Jones v. Barnes*, 463 U.S. 745, 750 (1983) (noting that defendant has the ultimate authority as whether to testify or not); ABA Std. 4-5.2(a)(iv). An accused must personally make the decision to enter a guilty plea. *See* ABA Std. 4-5.2 (a)(i) (defendant's decision to plead guilty or not guilty); NLADA Std. 11.6.1 ("The Plea Negotiation Process"); ABA Guideline 11.6.1. (same). A guilty plea must be knowing and voluntary, with a full understanding of the terms and conditions of the plea. *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); NLADA Guideline 11.6.4(a) ("Entry of the Plea Before the Court"); ABA Guideline 11.6.4(A) (same). In addition, the decision whether to appeal is the defendant's own choice. ABA Std. 4-8.2 ("Appeal"). In order to determine whether to appeal, "[c]areful exploration should be made of the possible errors that could be pressed on appeal, their relative strengths and weaknesses, and the probable outcome of an appeal." ABA Std. 4-8.2 cmt. at 238.

Finally, the defendant's own participation is particularly critical at a capital sentencing. This participation has two aspects.

First, it is vital for the client to be capable of cooperating with counsel. In preparing for the sentencing phase, the attorney should consider calling witnesses "familiar with and evidence relating to the client's life and development, from birth to the time of sentencing." NLADA Std. 11.8.3(f)(1); ABA Guideline 11.8.3(F)(1) (same). Among the topics counsel should review are the client's medical, educational, employment, family and social histories, and rehabilitative potential. NLADA Std. 11.8.6(b) ("The Defense Case At The Sentencing Phase"); ABA Guideline 11.8.3(B) (same). An attorney who fails to conduct a full investigation and consult with her or his client is constitutionally ineffective. *See, e.g., Harris v. Dugger*, 874 F.2d 756, 763-64 (11th Cir.) (counsel was ineffective due to failure to conduct a full background investigation for sentencing phase), *cert. denied*, 493 U.S. 1011 (1989); *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988) (same).

Counsel cannot provide the assistance required by the Sixth Amendment and professional standards unless the client is competent. As one commentator notes, the client must "actively assist in the investigation of his or her life entire life." Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 321 (1983). As part of this effort,

> "[c]ounsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors . . . A substantial mitigating case may be impossible to construct without this kind of life-history investigation, which is a very different inquiry from an investigation of facts relating to an offense. Not only does it call for imagination and resourcefulness on the part of defense counsel, it also requires that the defendant reveal himself completely to counsel and take an active role in saving his own life."

Id. at 321-22. An incompetent defendant will be unable to provide the information that counsel needs to mitigate a sentence of death.

A second aspect of the defendant's participation at sentencing is the defendant's personal appearance before the sentencing jury and the opportunity to address it. Professional standards require counsel to "consider having the client testify or speak during the closing argument of the sentencing phase." NLADA Std. 11.8.6(d); ABA Guideline 11.8.3(D). As Justice Kennedy notes in *Riggins*, a sentencing jury "must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness." *Riggins*, 504 U.S. at 144 (Kennedy, J., concurring). Thus, "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Id.* (citation omitted). An incompetent defendant is not capable of appearing before the jury and expressing the sentiments that are critical to the jury's sentencing judgment. In a very real sense, such a defendant is not present at sentencing at all.

2. There is a great risk that incompetent defendants will be unable to prove their incompetency by the heightened standard of clear and convincing evidence.

Incompetency is often difficult to prove. In requiring the State to establish the criteria for civil commitment by clear and convincing evidence, the Court acknowledged that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979). Indeed,

> "[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process

> often makes it very difficult for the expert physician to offer definite conclusions about any particular patient."

Id. Although the Oklahoma court quoted this language from *Addington*, the court found just the opposite and concluded that "[a] truly incompetent defendant, through his attorneys and experts, can prove incompetency with relative ease." *Cooper v. State*, 889 P.2d 293, 303 (Okla. Crim. App. 1995). This conclusion is difficult to understand because, just like the procedure to commit a person involuntarily, the court procedure to determine competency also requires psychiatric analysis. *See* Okla. Stat. Ann. tit. 22, § 1175.4 (West 1995 supp.).

In *Addington*, the Court recognized that mental status could be quite difficult to prove and thus the burden of proving the criteria for commitment by a heightened standard was placed upon the State. The burden was placed on the State, instead of the individual, because of the "significant deprivation of liberty" and "adverse social consequences" caused by involuntary civil commitment. *Addington*, 441 U.S. at 425-26. The Court acknowledged that

> "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"

Id. at 423, *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Given the substantial risk of error in establishing an individual's mental status and given the strong interest in being free from commitment, it was appropriate in *Addington* that the risk of error be borne by the State.

Addington is just one example of the State being required to meet a heightened standard of proof due to the significant individual interests at stake. Other such cases include *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights), *Woodby v. INS*, 385 U.S. 276 (1966) (deportation), and *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization). In all of these instances, a heightened burden was required to protect the individual against governmental actions.

The decision below turns *Addington* and these cases on their heads. The allocation of such a high standard of proof to the accused simply means that the defendant bears the risk of error. In this circumstance, it means that many factually incompetent defendants will be forced to trial simply because they will be unable to prove their own incompetency.

3. The State's interest in protecting society through a prompt trial judgment is tempered by the confinement of a defendant who is unfit to stand trial.

The State of Oklahoma has a legitimate interest in bringing an accused to trial, and attempting to impose a criminal sanction, in a reasonably prompt fashion. There are several classic purposes for criminal punishment, including incapacitation, deterrence, rehabilitation and retribution. *See* W. LaFave & A. Scott, Criminal Law § 1.5(a) (2d ed. 1986). These purposes are not necessarily thwarted when an accused is incompetent to stand trial and the criminal processes are suspended.

In Oklahoma, as in other jurisdictions, "[i]f the defendant is found incompetent, the criminal proceedings are suspended and he is invariably committed to a mental institution until he recovers." LaFave & Scott, § 4.4(a); *see also* Okla. Stat. Ann. tit. 22, § 1175.6 (West 1995 Supp.) (if person is incompetent and capable of achieving competence, "the court shall remand the person" to mental health custody and a person who is unfit to stand

trial on charges punishable by death or life imprisonment "shall be placed in a maximum security ward"); 18 U.S.C. § 4241 (1994) (if defendant is found incompetent, the court shall commit the defendant to custody). There are limits on the period of time that an accused may be held solely on the basis of incompetency. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (defendant may be held for "the reasonable period of time necessary to determine" whether she or he will be competent in the foreseeable future). Nevertheless, if a person remains incompetent even after that period, he or she may be civilly committed. *Id.*

The State's interest in promptly punishing an offender is tempered by the fact that an incompetent defendant is confined. That confinement satisfies the State's goal of incapacitation. The other classic purposes of punishment are also served, though to somewhat lesser extents. As the Court has stated, "commitment to a mental hospital 'produces a massive curtailment of liberty.'" *Vitek v. Jones*, 445 U.S. 480, 491 (1980), *quoting Humphrey v. Cady*, 405 U.S. 504, 509 (1972). This involuntary commitment in a facility that provides mental health care will have some deterrent, rehabilitative and even retributive effect. The State has a legitimate interest in obtaining a prompt adjudication. But the State's interest is diminished by the custodial confinement that invariably follows a finding of incompetency.

C. The common law tradition and contemporary norms support the preponderance of the evidence standard.

It is well established that at common law a capital criminal defendant could not stand trial if he or she was incompetent. As Blackstone writes, "if a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought." 4 W. Blackstone, Commentaries *24. Hale similarly relates,

> [i]f a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law be arraigned during such his phrenzy . . . [a]nd if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried . . . for were he of sound memory, he might allege somewhat in stay of judgment or execution."

M. Hale, 1 Pleas of the Crown *34-*35 (1680);[11] *see also* W. Hawkins, 1 A Treatise of the Pleas of the Crown 1716-1721 2 (P.R. Glazebrook, ed., 1973) ("And it seems agreed at this Day, That if one who has committed a capital Offence, becomes *Non Compos* before Conviction, he shall not be arraigned"). In England, this common law tradition in capital cases was made applicable in 1800 to defendants charged with all crimes. *See* 39 & 40 Geo. III, c. 94, § 2.

Early American cases followed these principles. *See, e.g., Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) ("It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment"); *State v. Reed*, 7 So. 132 (La. 1889) ("It is elementary that a man cannot plead, or be tried or convicted or sentenced, while in a state of insanity"); *Crocker v. State*, 60 Wis. 553, 556-57 (1884) ("At common law, if a person, after committing a crime, became insane, he was not arraigned during his insanity, but was remitted to prison until such incapacity was removed . . . Our statute has adopted substantially the same practice"); *Guagando v. State*, 41 Tex. 626, 630 (1874) ("No person who becomes insane after he has committed an offense shall be tried for the same while in such

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[11] Hale's (and, presumably, Blackstone's) use of the term "memory" "does not relate to recollection, but to a state of mind." *R. v. Podola*, [1959] 3 All E.R. 418, 431.

condition", *quoting* the State's criminal code); *Taffe v. State*, 23 Ark. 34, 36 (1861) ("The first principles of the elementary books are, that whenever a person is disqualified from defending himself, by the loss or want of reason, he shall not be the subject of a legal prosecution or penalty").

An historical analysis of the common law tradition demonstrates clear links between the procedures established to determine sanity of an individual in the civil and criminal contexts. Sir Matthew Hale writes of the presumptions of sanity in civil and criminal proceedings and notes that "every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal." Hale at *33. With respect to criminal responsibility, Hale continues,

> if a man be a lunatic, and hath his *lucida intervalla*, and this be sufficiently proved, yet the law presumes the acts or offenses of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears they were committed in the time of his distemper; and this also holds in civils as well in criminals."

Id. at *33-*34.

In the criminal context, the jury had the responsibility to determine competency before the accused went to trial. British historian Nigel Walker has studied the role of the jury at common law in assessing competency of the criminal defendant. Walker relates that an "inquest of office" was held and "although it was to be held by twelve jurors, [it] was modelled not on the petty jury . . . but on the civil inquests which were held as a result of writs from the Chancellor 'de lunatico inquirendo', and which decided whether the subject of the writ was mentally competent to manage his own affairs." N. Walker, 1 Crime and Insanity in England: The Historical Perspective 221 (1968). Thus, when it became

necessary to determine "whether a Criminal, who at his Trial is in appearance a Lunatick, be such in Truth or not, it shall be tried by an Inquest of Office, to be returned by the Sheriff of the County wherein the Court sits . . . ." Hawkins, at 2.

These procedures were maintained in place by statute in 1800, when the common law competency rules were extended from capital cases to all criminal cases. English law then provided:

> "That if any Person indicted for any Offence shall be insane, and shall upon Arraignment be found to be by a Jury lawfully impannelled for that Purpose, so that such Person cannot be tried upon such Indictment, or if upon the Trial of any Person so indicted such Person shall appear to the Jury charged with such Indictment to be insane . . . . it shall be lawful for such Court to order a Jury to be impannelled to try the Sanity of such Person . . . ."

39 & 40 Geo. 3, ch. 94, § 2. Nineteenth-century English decisions reveal that courts adhered to this practice. *See, e.g., R. v. Turton*, 6 Cox. C.C. 385 (1854) (judge empaneled a jury to determine whether the accused was competent to plead); *R. v. Davies*, 6 Cox C.C. 326, 175 Eng. Rep. 575 (1853) (same).

It is highly significant that common law competency determinations in criminal cases were modeled on civil proceedings. As early as 1571, it was understood that the standard of proof in civil matters was a preponderance of the evidence. In that year, Chief Justice Dyer and a majority of the other judges of the Common Pleas distinguished the standard by which pre-trial pleadings were measured from the standard of proof in civil trials. They held that when a case has proceeded to trial,

> "so that the jury is to give a verdict one way or

> the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

Newis v. Lark, 75 Eng. Rep. 609, 621 (1571). Almost three hundred years later, the holding in *Newis* was relied upon by Judge Willes, in a dispute before the House of Lords, for the proposition that "in civil cases the preponderance of probability may constitute sufficient grounds for a verdict." *Cooper v. Slade*, 27 L.J.Q.B. (n.s.) 449, 457 (1858). Judge Willes' statement has been characterized as "the classic pronouncement on the subject." *R. v. Carr-Braint*, [1943] 2 All E.R. 156, 158 (quoting both Judge Willes and *Newis v. Lark*).

The actual language employed by the English trial judges also establishes that preponderance of the evidence was the common law standard to decide competency to stand trial. In *R. v. Frith*, 22 Howell's St. Tr. 307 (1790), defense counsel questioned the competency of the accused, who was charged with high treason for throwing a stone at the King's coach. A jury was empaneled and was instructed by the court to "diligently inquire . . . whether John Frith, the now prisoner at the bar . . . be of sound mind and understanding *or not*, and a true verdict give according to the best of your understanding . . . ." *Frith*, at 311 (emphasis added). Similarly, in *R. v. Dyson*, 173 Eng. Rep. 135 (1831), the judge, quoting Hale, impaneled a jury "to inquire *ex officio* touching such insanity, and whether it be real *or* counterfeit." *Dyson*, 173 Eng. Rep. at 136 (emphasis added). The judge stated that "if *they were satisfied* that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." *Id.* (emphasis added). The role of the jury is further illustrated in *R. v. Pritchard*, 173 Eng. Rep. 135 (1836), where the jury was directed to determine "whether the prisoner is mute of malice *or not*; secondly, whether he can plead to the indictment *or not*; thirdly, whether he is of sufficient intellect to

comprehend the course of proceedings on the trial . . . ." *Pritchard*, 173 Eng. Rep. at 135. (emphasis added).

This phrasing of instructions in the alternative, competent "or not," indicates that the jury was to find one way or the other, based upon the greater weight of the evidence. This meaning is unmistakable when one understands that competency determinations were treated as civil proceedings, that the standard of proof in civil proceedings was understood to be a preponderance of evidence, and that the juries were not instructed to apply any standard other than preponderance of the evidence. This meaning is confirmed by later English authority. The court in *R. v. Podola*, [1959] 3 All E.R. 418 (Lord Parker, C.J.), held that

> "there is in our judgment a burden on the defence of satisfying the jury of the accused's [incompetency]. In such a case, as in other criminal cases in which the onus of proof rests on the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's [incompetency] has been made out."

Podola, 3 All E.R. at 429. The *Podola* court stated that "[t]hese principles are in accordance with those laid down in a number of cases", including *Pritchard*, *Dyson*, and *Turton*. *Id.*

Finally, contemporary norms in the allocation of burden of proof of proving incompetency support the use of the preponderance of the evidence standard. In his brief, Petitioner establishes that the overwhelming majority of American jurisdictions currently place no greater burden on the defendant than preponderance of the evidence. The American Bar Association standards also recommend proving competency to stand trial by "the greater weight of the evidence", and not by a higher standard. ABA Mental Health Std. 7-4.8(c)(2).

In determining whether a State's burden of proof violates

the Due Process Clause, the Court considers the relative interests of the parties, historical tradition, and contemporary norms. The accused has a compelling interest in being tried and sentenced while competent, and a lawyer for an incompetent defendant cannot render effective assistance. The State's interest in a prompt trial judgment is greatly overshadowed by the injustice of trying and sentencing an incompetent defendant. Furthermore, both common law tradition and contemporary norms support a preponderance of the evidence standard for determining competency. Therefore, the Court should find that Oklahoma's heightened clear and convincing evidence standard is a violation of the Due Process Clause.

II. The Heightened Standard To Prove Mental Incompetency Is A State-Imposed Procedural Barrier To The Consideration Of Relevant Mitigating Evidence, Which Violates The Eighth and Fourteenth Amendments.

A capital sentencing must be individualized, with a full opportunity for the defendant to present mitigating evidence. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court struck down a statute that required the death penalty for first-degree murder since the Eighth Amendment "requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (Opinion of Stewart, Powell, and Stevens, JJ.). Whatever the procedure in a non-capital case, "the penalty of death is qualitatively different from a sentence of imprisonment" and "there is a corresponding difference in the need for reliability" in the imposition of a sentence of death. *Id.* at 305; *see also Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (noting that many limits on capital punishment "are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.")

Since the *Woodson* decision, the Court has sought to

ensure that capital proceedings are individualized and, hence, reliable, by striking down barriers to the presentation of mitigating evidence. In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality of the Court found that a statute unduly restricted the consideration of mitigating evidence. As the plurality held, the sentencer must not be precluded from considering "any aspect of a defendant's character or record" as a mitigating factor. *Lockett*, 438 U.S. at 604. The *Lockett* rule was affirmed by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). In *Eddings*, a death sentence was overturned where the trial judge instructed the jury that it could not consider mitigating evidence of the defendant's family history. *Id.* at 112-17. As the Court held, the sentencing jury "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15. The Court has applied the *Lockett* rule to invalidate a variety of obstacles to the consideration of mitigating evidence. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433 (1990) (vacating a death sentence where the jury was instructed to make unanimous findings on each mitigating circumstance and to consider only those circumstances); *Mills v. Maryland*, 486 U.S. 367 (1988) (overturning a death sentence where the jury may have believed that unanimity was required to consider mitigating evidence); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (striking down a statute that limited the categories of mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (reversing a death sentence where the trial judge excluded mitigating evidence of the defendant's good adjustment in prison).[12]

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[12] Of course, that a sentencing authority must be permitted to consider all relevant mitigating evidence does not mean that a capital sentencing hearing must be without direction. The State may promulgate rules of procedure to guide the presentation of evidence and to channel the exercise of sentencing discretion. Thus, in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court upheld a statute that required the jury to sentence the defendant to death if the aggravating circumstances

(continued...)

Thus, under *Lockett* and its progeny, the sentencing authority must be permitted to consider all types of relevant mitigating evidence. While the State may enact procedures to guide the presentation of this evidence, it may not erect a barrier to the jury's consideration of particular mitigating circumstances. The standard for evaluating a *Lockett* rule violation in this context is whether the error may be deemed harmless beyond a reasonable doubt. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990).[13]

The Oklahoma legislature has erected a significant structural barrier to the consideration of mitigating evidence. Just as the State may not exclude whole categories of mitigating evidence or provide, for example, that the defendant be sentenced *in absentia*, so too the legislature may not substantially curtail the defendant's own participation at sentencing. *Amicus curiae* has already explained the importance of the defendant's ability to appear personally before the sentencing authority and to work with counsel to present a case in mitigation. By requiring Mr. Cooper to prove his own incompetency by a heightened standard, and by

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[12](...continued)
outweighed any mitigating circumstances. Because the statute did not prevent the jury from considering relevant mitigating evidence, there was no violation of the *Lockett* rule. *Blystone*, 494 U.S. at 308; *see also Johnson v. Texas*, __ U.S. __, 113 S.Ct. 2658, 2669 (1993) (affirming a death sentence where the defendant's youth was considered in the context of his future dangerousness, but was not altogether eliminated from the jury's consideration); *Romano v. Oklahoma*, __ U.S. __, 114 S.Ct. 2004, 2011 (1994) (no claim was made that defendant was precluded from presenting mitigating evidence, but the Court held that "[t]he Eighth Amendment does not establish a federal code of evidence . . . in capital sentencing proceedings").

[13] By comparison, if there is instructional error, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

proceeding to trial and sentencing Mr. Cooper in the face of evidence that he was unable to assist his counsel, the State erected a constitutionally unacceptable barrier to the presentation of mitigating evidence. This barrier cannot be deemed harmless beyond a reasonable doubt. The Court should, therefore, vacate the sentence of death.

CONCLUSION

For the reasons set forth in this brief, *amicus curiae* respectfully asks this Court to reverse the decision below.

Respectfully submitted,

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